

# Exhibit 5

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**From:** David Perlson  
**Sent:** Friday, February 12, 2010 7:05 PM  
**To:** 'Marc Fenster'  
**Cc:** 'David Pridham'; Brian Cannon; PA Advisors v. Google; 'Andrew Spangler'; 'gil@gillamsmithlaw.com'; 'melissa@GillamSmithLaw.com'; 'White, Jason'; 'Alex Giza'  
**Subject:** RE: Amended DCO

Marc –

We had hoped to work cooperatively with Plaintiff in scheduling the depositions and coordinating the pretrial work given the busy schedule leading up to the March 1 pretrial conference date. I disagree with your characterizations in your email which do not properly reflect our efforts and what has occurred.

We had offered Fox on Feb. 17-18 as an accommodation to you when we thought that you were going to produce Rhyne on Feb. 16-17, as you said you would, so that Fox could go after Rhyne. As we have said repeatedly, Rhyne needs to go first. If Plaintiff is not going to produce Rhyne until Feb. 18-19 – the last two days of expert discovery – Fox cannot go on Feb. 17-18 and we are not going back on anything we agreed to. I note that Plaintiff had previously pulled other dates for Rhyne as well.

I spoke with David Pridham and you yesterday and you asked what dates he would be available after Rhyne, assuming Rhyne was not available until Feb 18 and 19th. I also asked you to again look for earlier dates for Rhyne (I have not heard back on this). I then spoke with David Pridham yesterday evening, and told him that if Plaintiff can't produce Rhyne until Feb 18-19, we could make Fox available on March 3<sup>rd</sup>. David said he didn't think that would be a problem but would need to check with you. This morning, you and David called me asking whether he would be available on the 3<sup>rd</sup> and also for a couple of extra hours on the 4<sup>th</sup>. I said I did not know about the 4<sup>th</sup> but said I would check based on your request. I found out that this would work, and so informed you around noon today.

Then, at the end of the day, in an email and on our call you told me that you want him on Feb 17-18 and that you are "reserving all rights" (presumably to later object) if we produce him on March 3 and 4—even though you want us to hold these same dates. Again, Fox cannot be deposed on Feb 17-18 because you have refused to provide Rhyne until Feb 18-19. It is unreasonable for you to use your refusal to provide your expert on infringement before the last two days of expert discovery against us.

I also asked you on our call this afternoon to confirm Ugone for March 5, which we have asked you to confirm before. Again, Mr. Ugone's deposition needs to occur after February 19 because you cannot make your damages expert available until February 23 and 24, which we have agreed to accommodate. Here too, it would be unreasonable for you to use our cooperation with Plaintiff's inability to provide its expert within the deadline, and our cooperation given the circumstances, against us. You said you couldn't confirm the March 5 date because you were not the one taking his deposition. You then ended the call by saying I needed to email Alex Giza, you and David Pridham (all of whom are cc'd on this email) with this March 5 date and that Mr. Giza would get back to me, said "have a good weekend," and then hung up on me preventing further discussion.

I also note that while we have already produced Mossinghoff and Peters, Plaintiff has yet to provide a single expert for deposition – and will not do so until the day before the close of expert discovery. As Andrea Roberts' emails of February 9<sup>th</sup> and 10<sup>th</sup> illustrate, we have been trying to resolve these issues with you for some time now, but seem to be no closer to a resolution. And it is now a week before the current expert deadline. Thus, we feel it necessary to seek Court intervention to prevent Plaintiff from using its inability to provide experts in a timely fashion to prejudice Google.

We intend to seek the following relief:

-- Moving the Daubert deadlines to Feb 23 for Rhyne and Gordon, and for Feb 26 for Becker. We will also ask for leave to take Becker on Feb 23 and 24. You have represented to me that Plaintiff does not oppose this relief.

--Moving the close of expert discovery for Fox and Ugone so that their depositions may take place on March 3 and 4 (7-9 am), and March 5 respectively. We would also request that Plaintiff's date for Daubert motions as to these expert be moved to March 8 if such leave is granted. Let us know if you will oppose these requests.

We intend to bring our motion so the Court has it first thing Monday. Please respond before then.

Thanks,

David

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**From:** Marc Fenster [mailto:[mfenster@raklaw.com](mailto:mfenster@raklaw.com)]  
**Sent:** Friday, February 12, 2010 3:48 PM  
**To:** David Perlson  
**Cc:** David Pridham; Brian Cannon  
**Subject:** Re: Amended DCO

David,

This will confirm that you refused to produce Fox on Feb. 17-18 as you previously agreed, and for which you have confirmed on multiple occasions that he is available. You have represented that Fox is available March 3-4. Please hold those dates. We reserve all rights.

Marc

Marc Fenster  
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310-826-7474 (main)  
[mfenster@raklaw.com](mailto:mfenster@raklaw.com)

On Feb 12, 2010, at 3:36 PM, David Perlson wrote:

Thanks.

Can you please call me re experts?

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**From:** Marc Fenster [mailto:[mfenster@raklaw.com](mailto:mfenster@raklaw.com)]  
**Sent:** Friday, February 12, 2010 3:20 PM  
**To:** David Perlson  
**Cc:** David Pridham; Brian Cannon  
**Subject:** Re: Amended DCO

David,

We are in agreement regarding moving these three dates from 2/15 to 2/17. As to the rest, we will send a redline over the weekend with the aim of filing monday or tuesday, as these depend on what is finalized regarding experts.

Thanks,

Marc

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On Feb 12, 2010, at 2:25 PM, David Perlson wrote:

Marc or David, can you give me call. 415-875-6344. Want to try to wrap this stuff up. David

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**From:** David Perlson  
**Sent:** Friday, February 12, 2010 12:57 PM  
**To:** 'David Pridham'  
**Cc:** Brian Cannon; 'Marc Fenster'  
**Subject:** Amended DCO

David, as we discussed yesterday, attached is the draft Amended DCO we had sent. You had indicated you thought we could move the dates for disclosures on 2 15 to 2 17. These are:

38	Parties make pretrial disclosures	2/15/10
40	Plaintiff to provide Defendants with information for Joint Final Pretrial Order, proposed Jury Instructions and Verdict Form	2/15/10
41	Defendants to provide Plaintiff with information for Joint Final Pretrial Order, proposed Jury Instructions and Verdict Form	2/15/10

Please confirm that is acceptable. Also, we should get closure on the DCO and submit it the Court so everyone is on the same page re dates.

Thanks,

David